

MINUTES

MONTANA SENATE 59th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN MIKE WHEAT**, on February 14, 2005 at 8:00 A.M., in Room 102 Capitol.

ROLL CALL

Members Present:

Sen. Mike Wheat, Chairman (D)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jon Ellingson (D)
Sen. Jesse Laslovich (D)
Sen. Jeff Mangan (D)
Sen. Dan McGee (R)
Sen. Lynda Moss (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Jim Shockley (R)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Branch
Mari Prewett, Committee Secretary

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: SB 387, 2/9/2005; SB 385, 2/9/2005;
SB 402, 2/9/2005
Executive Action: SB 146; SB 43; SB 319; SB 344; SB
374; SB 375

EXECUTIVE ACTION ON SB 146

SEN. DANIEL MCGEE, SD 29, said that the Subcommittee on SB 146 individually processed a series of nine amendments to SB 146. Further Subcommittee discussions uncovered possible problems with the numbers contained in the bill. SB 146 was again revised resulting in the SB 146 gray bill--Establishing the Montana Public Defender Act. **SEN. MCGEE** provided a brief synopsis of the gray bill and its associated amendments.

EXHIBIT(jus36a01)

EXHIBIT(jus36a02)

{Tape: 1; Side: A; Approx. Time Counter: 18.6 - 22.4}

Motion: **SEN. MCGEE** moved that SB 146 DO PASS.

Motion: **SEN. MCGEE** moved the approval of amendment #SB014609.av1.

Discussion:

SEN. JEFF MANGAN, SD 12, asked if a revised fiscal note was available and, if so, what impact would the amendments have on SB 146. **Brent Doig, Office of Budget and Program Planning (OBPP)**, said that the estimated total cost would not change much from the original fiscal note. What has been tweaked is the estimated amount that the state was going to assume from local entities.

SEN. MANGAN asked if local governments were picking up more or less than what was indicated in the original fiscal note. Although **Mr. Doig** was unsure, he felt that once the adjustments were completed, based upon the audits, it would be very similar to the estimations in the original fiscal note. **SEN. MCGEE** added that the Subcommittee worked with the original figure of \$1,000,040. The various amounts that counties paid changed, but the dollar total remained the same. **SEN. MANGAN** asked if local governments approved of the final amounts that went into SB 146. **SEN. MCGEE** said, yes.

{Tape: 1; Side: A; Approx. Time Counter: 22.4 - 26.3}

SEN. AUBYN CURTISS, SD 1, asked if the intent of SB 146 was to conduct ongoing audits of the six most populous counties and cyclical audits of the remaining counties. **SEN. MCGEE** said that the Department of Revenue and OBPP decided that the amount of money affected would be germane only to the six most populous counties. The remaining jurisdictions were within a dollar figure that did not warrant an audit at this time.

SEN. MCGEE added that a further amendment related to "fitness to proceed" still remains. In a criminal case, either the prosecutor or the defendant's attorney can request an evaluation for "fitness to proceed". This is important because the cost for a doctor to assess the fitness of a defendant is small, but the cost to house the defendant during the assessment, at Warm Springs for example, may be quite high.

{Tape: 1; Side: A; Approx. Time Counter: 26.3 - 29.9}

SEN. JIM SHOCKLEY, SD 45, felt that the state would be paying for the "fitness to proceed" assessment regardless of who requests it because the county attorney and defense counsel will work out a deal. He asked if the money figures were the same figures provided by the Department of Justice during the 2003 interim committee discussions. If so, the figures were incorrect and should not be relied upon. He said that 97% of the people in Ravalli County are represented by public defenders. **SEN. MCGEE** said that the closest true dollar figure that the Subcommittee could come to is included in SB 146, with the exception of the six populous counties that will be audited. **SEN. SHOCKLEY** said, the reason actual expenditure figures were used was to ensure that the state would not be locked into a set percentage cost and because the interim committee wanted to get a handle on what those costs might be.

{Tape: 1; Side: A; Approx. Time Counter: 29.9 - 30.0}

Vote: **SEN. MCGEE'S** motion that amendment #SB014609.av1 be approved passed on a 12 to 0 voice vote. **SEN. BRENT CROMLEY, SD 25**, voted aye by proxy.

Motion: **SEN. MCGEE** moved that SB 146 DO PASS AS AMENDED.

{Tape: 1; Side: B; Approx. Time Counter: 2.3 - 3.1}

Discussion: **SEN. MANGAN** questioned whether the amendment regarding the "fitness to proceed" assessments would be discussed during Second Reading. **SEN. MCGEE** said that the amendment was not available but could be discussed during Second Reading of the Senate or when it reaches the Finance and Claims Committee.

Vote: **SEN. MCGEE's** motion that SB 146 DO PASS AS AMENDED carried unanimously by voice vote. **SEN. CROMLEY** voted aye by proxy.

EXECUTIVE ACTION ON SB 43

{Tape: 1; Side: B; Approx. Time Counter: 3.1 - 6.2}

Committee discussion and approval of amendment #SB004301.avl (provides that citations or notices to appear will be issued to adult passengers not wearing properly adjusted and fastened seatbelts as required rather than the driver of the vehicle) were held at a previous meeting.

EXHIBIT(jus36a03)

Motion: SEN. LASLOVICH moved that SB 43 DO PASS AS AMENDED.

Discussion: SEN. MCGEE opposed SB 43 because he felt that it would subject Montana citizens to one more encumbrment and investigation by law enforcement. He said that although it would not force people to wear seatbelts, people could still be pulled over and investigated if law enforcement is in doubt as to whether seatbelts are being used. He felt it better that, over time, people be allowed to become convinced to do that which is right for them without making them a criminal and subject to a fine.

Vote: SEN. LASLOVICH'S motion that SB 43 DO PASS AS AMENDED failed on a 6 to 6 roll call vote. SENATORS O'NEIL, SHOCKLEY, PEASE, MCGEE, PERRY, AND CURTISS voted nay. SEN. CROMLEY voted aye by proxy.

HEARING ON SB 387

{Tape: 1; Side: B; Approx. Time Counter: 6.2 - 8.5}

Opening Statement by Sponsor:

SEN. TRUDI SCHMIDT (D), SD 11, said that SB 387 provides alternate sentencing to a residential methamphetamine (meth) treatment program for persons convicted of a second offense for the possession of methamphetamine, provides for conditions of placement in aftercare, and provides that the Department of Corrections issue a request for proposal (RFP) for any contract to operate a residential meth treatment program.

A bill introduced by REP. JIM PETERSON, HD 30, was amended to include the RFP and the placements in aftercare.

{Tape: 1; Side: B; Approx. Time Counter: 8.5 - 11.5}

Proponents' Testimony:

Mike Rupert, CEO, Boyd Andrew Community Services of Helena, said that there are two aspects to SB 387 that were important to him. First, the RFP so that nonprofit agencies can bid on providing

the service. He felt it good public policy because it would ultimately lower the cost of services. Secondly, the emphasis on prerelease for the aftercare component of the meth treatment.

Mr. Rupert said that treatment in the world of corrections is different than treatment in the world of health and human services. Corrections bases its treatment on a therapeutic-community model. This model does not place an emphasis on individualized treatment nor variable length of stay. The therapeutic-community model provides fixed lengths of stay irregardless of what an individual needs, and it provides uniform, nonindividualized treatment during the course of nine months. However, health and human services treatment places its emphasis on individualized treatment and variable lengths of stay, meaning that individuals receive the services that they need. SB 387 allows for a gradual move toward variable lengths of stay and individualized treatment within the corrections arena. He added that it is very important that these people are able to deal with their meth addictions and everyday problems at the same time. The prerelease arena can make that happen because they are out in the world, at least partially, during that phase.

{Tape: 1; Side: B; Approx. Time Counter: 11.5 - 15.5}

Mona Jamison, Boyd Andrew Community Services and the Great Falls Prerelease Center, said that to not have aftercare in a prerelease center following meth treatment in a treatment facility means that the money spent would be thrown away because of the strength of the meth addiction. Aftercare, provided through prerelease along with individual accountability, works to get individuals back into the community and builds on the foundation of the treatment. SB 387 ensures that whoever receives the RFP for the meth treatment center will be the result of the RFP.

Ms. Jamison added that SB 387 and HB 326, with amendments, by **REP. JIM PETERSON, HD 30**, do the same thing. **SEN. SCHMIDT** and the stakeholders are working with **REP. PETERSON** to ensure that **SEN. SCHMIDT** will be the Senate sponsor of HB 326. At this point, there is no need for two bills that basically accomplish the same things. She said that the contents of the two bills are critically important if the state is going to address meth addiction which is consuming many Montana citizens.

{Tape: 1; Side: B; Approx. Time Counter: 15.5 - 17.0}

Mike Ferriter, Administrator, Community Corrections Division, Department of Corrections, said that the Department indicates in the fiscal note that it anticipates an RFP in the event that such

a project is approved by the Legislature. The Department also feels that a plan for any meth treatment program must include appropriate aftercare services, of which prerelease centers are part of the package for the appropriate reentry of offenders completing the program. He added that the Department also feels that a different approach is needed to deal with methamphetamine, and it supports the need for a specified meth program in the state.

{Tape: 1; Side: B; Approx. Time Counter: 17.0 - 19.2}

Don Hargrove, MT Addiction Services Providers, said that seven or eight years ago, nobody in Montana heard of methamphetamine. Today, everyone has heard about it. SB 387 is a pro-active bill with a new and firm approach to the meth problem, and the prerelease portion is absolutely essential to provide transition of individuals back into the communities following the meth treatment program.

{Tape: 1; Side: B; Approx. Time Counter: 19.2 - 20.9}

J.D. Lynch, Butte Community Corrections and Counseling, said that the group he represents supported both HB 326 and SB 387. Some answer must be found for the meth problem, and they believe treatment is one of the answers. The WATCH program for convicted, 4th-time DUI offenders has been a resounding success, far greater than anyone anticipated. He added that Montana's prison system is filling up, much of which is due to the meth problem within the state. Treatment may well be a way to eliminate some of the problem.

Charles Brooks, Alternative, Inc., Billings, spoke in support of SB 387 and HB 326.

{Tape: 1; Side: B; Approx. Time Counter: 20.9 - 22.8}

Pam Bucy, Assistant Attorney General, said that meth is a very complicated issue and requires many different components to overcome. Methamphetamine is a very different drug because addiction can happen immediately after the first use, and it is cheap to produce. Meth addicts will do anything to get the drug, and SB 387 provides for a secure treatment facility which is needed before individuals can function in a community.

Opponents' Testimony: None.

Informational Testimony: None.

Questions from Committee Members and Responses:

{Tape: 1; Side: B; Approx. Time Counter: 23.0 - 23.1}

SEN. SHOCKLEY asked if there was a protocol to treat meth addiction whereby the treatment outcome could be predicted. **Mr. Rupert** said that the outcome for meth treatment has not been substantially different from the treatment of any other drug addiction. The only difference between meth and other drugs is that the physical detoxification phase can be substantially lengthened because of the physiological complications of chronic use. The recovery rate for the traditional treatment of drug addiction is 50%. **SEN. SHOCKLEY** said that according to previous testimony, the Department of Corrections had no predictions on how long an individual was to remain in treatment. **Mr. Rupert** said that testimony was from proponents of the therapeutic model. The treatment world does not believe that length of stay is the determining factor in treatment outcomes.

SEN. LASLOVICH felt that the court currently orders treatment. He questioned the necessity of the language that "the court shall order", when they already do it. He felt that the judge should have discretion in sentencing. **Mr. Ferriter** said that the foundation language contained in SB 387 is similar to the language in the felony DUI bill. There are conditions within SB 387 that are not among the Department's eight standard conditions for probation and parole release. Contrary to popular belief, everyone on adult probation and parole does not have an alcohol problem. Legally, the Department feels it cannot put a standard condition on a person who does not have a problem with alcohol. The Department clearly feels that people with a meth addiction should not consume alcohol or be in gambling establishments, which are not standard conditions of the Department. In order for a successful probation period, the Department felt that these conditions should be standard rather than the court go through a special condition. He added that most often, alcohol and staying away from gambling establishments are standard conditions, but the judge must specify it. **SEN. LASLOVICH** asked if it was appropriate for the judge to have discretion in what the conditions of the sentence are. **Mr. Ferriter** said, yes. However, when he sees the investment that the state and individuals are making, the Department felt it to be an advantage for the state to keep people out of the bars and gambling casinos after the commitment to the state is made.

{Tape: 2; Side: A; Approx. Time Counter: 0.6 - 1.7}

SEN. MCGEE asked if a cure for methamphetamine addiction was possible. **Mr. Rupert** said that the problem could be arrested but not cured. People with addictions usually have drugs of choice,

and recovery involves abstinence from all drugs, including alcohol.

{Tape: 2; Side: A; Approx. Time Counter: 1.7 - 4.3}

SEN. WHEAT asked why SB 387 did not include a fiscal note. **SEN. SCHMIDT** said that a fiscal note was requested but has not been received. However, according to the fiscal note to HB 326, there would be a \$600,000 general fund impact in fiscal year 2006 and a \$1.7 million impact in fiscal year 2007.

Closing by Sponsor:

SEN. SCHMIDT said that testimony indicates the importance of treatment and a meth treatment facility in the state. She requested the Committee's support of SB 387 or HB 326.

HEARING ON SB 385

{Tape: 2; Side: A; Approx. Time Counter: 4.3 - 13.2}

Opening Statement by Sponsor:

SEN. JOHN ESP (R), SD 31, said that SB 385's genesis came from the many letters he received from families who have had experiences with the Department of Public Health and Human Services (DPHHS) in the area of child protective services that they thought to be unfair. SB 385 is another attempt to give a person independent of the Department, such as what is done through the Mental Health Ombudsman's Office, the ability to help families who are having problems navigating the complexity of the DPHHS system.

SEN. ESP provided amendment #SB038501.asb regarding the limits on the workload of the mental health and family ombudsman as it relates to the child protective services system for the Committee's consideration.

EXHIBIT(jus36a04)

Proponents' Testimony:

{Tape: 2; Side: A; Approx. Time Counter: 13.3 - 17.9}

Mignon Waterman, former State Senator, Helena, said that, as State Senator, she also received a number of calls from people who were involved in having their children removed from their homes for abuse and neglect. Even though SB 385 needed further

amendments and work, she felt it was a good bill. She said one of the reasons that the state is seeing issues with foster care and federal review is that the state is not moving cases through the system in a timely fashion. Having an independent ombudsman who looks at the issues, considers them, and makes recommendations about the system is very important. The independent ombudsman's role would be much like the role of the Mental Health Ombudsman who looks at the cases from a system aspect (how did the system work or not work and what system changes need to occur). An ombudsman is needed in the area of foster care because it would help Montana meet the federal Medicaid mandates that it lost funding over in the 2003 Session.

{Tape: 2; Side: A; Approx. Time Counter: 17.9 - 22.9}

Anita Rossman, Attorney, Montana Advocacy Program (MAP), said that a long-time advocate for children in the public health system stated that children in the public health system in Montana had three things going for them, one of which was the Mental Health Ombudsman. The advocate added that an ombudsman always answers the phone and always returns the phone calls, which is why people think of the Mental Health Ombudsman as the place to add a new program, such as suggested in SB 385.

Ms. Rossman added that SB 385 needed word-smithing. She said that one of the things that an ombudsman does very well is to help people advocate for themselves--teaching people the way around the system, directing them to appropriate services, and making referrals. This is not reflected well in SB 385 whose emphasis seems to be on investigation. As she understands, the investigative role of the ombudsman in the mental health arena is secondary to helping people become effective advocates for themselves.

Ms. Rossman said that another bill introduced in the 2005 Session requires the appointment of counsel to the parents in child protective proceedings much earlier in the process. Although it will not solve the problem of people not understanding the requirements, not knowing where to go to complain, and not having anyone to explain things to them, it is a good start. The proposed ombudsman's office would be a power equalizer and a guide for the attorneys as well the families who get involved in the system. It is critical that there be someone who can investigate systemic issues as they become evident. She said that although the child protective services system is trying to change, historically, it has not respected parents because they are seen as the problem. If the state is going to make headway and make the system one where children do not spend years going

from placement to placement, it will be because parents are better involved and treated as part of the solution.

{Tape: 2; Side: A; Approx. Time Counter: 22.9 - 35.7}

Opponents' Testimony:

Shirley Brown, Administrator, Child and Family Services, DPHHS, provided written comments in opposition to SB 385.

EXHIBIT(jus36a05)

Pam Bucy, Assistant Attorney General, echoed **Ms. Brown's** testimony. She said that SB 385 does not set up a systemic examination of the child protective services process. It sets up an individual, case-by-case examination; provides for a second investigation; and embeds in the system a "second guesser" who is going to cause further delays for children and families. There are also problems with one person trying to represent the interests of children, immediate and extended families, and child custodians. She said that the Committee also needed to examine the fact that this person is authorized to communicate privately with any child and anyone working with the child. SB 385 will create confidentiality issues. It also requires a court order for a person to testify. Whether the ombudsman testifies or not, it will then become an appealable issue. Child protective services cases are very complicated and someone always ends up unhappy. Establishing another layer of bureaucracy within the system is a bad idea.

{Tape: 2; Side: A; Approx. Time Counter: 35.8 - 40.3}

Shirley Tiernan, Social Worker and Citizen, opposed SB 385 because of her disbelief that an ombudsman position would help move children through the system faster. She felt that it would only take further time away from those very people whose job it is to move children through the system. In every state, child protection is the agency that people love to hate because it involves "hot-button" issues. Social workers do work with children and families all the time, and there is a system of overview for every child removed from the home. If SB 385 is adopted as written, a one-half time position would be ridiculous. One position would be needed in each of the five regions of Child and Families Services because people will use the position. In addition, she felt that the investigatory part of SB 385 would be very detrimental to children.

Informational Testimony:

Bonnie Adee, Mental Health Ombudsman, said that she is aware of SB 385 and she also heard from individuals with allegations and concerns, most of whom are outside her current mandate of representing the interests of those in need of mental health services.

Questions from Committee Members and Responses:

{Tape: 2; Side: A; Approx. Time Counter: 40.3 - 45.8}

SEN. CROMLEY asked if **Ms. Adee** was considered a mediator. **Ms. Adee** said that it is confusing to have the mandate of representing interest and the title of Ombudsman. She tries to begin any situation neutrally to try and understand what is the person alleging and what actually happened. Once that is understood, she assists the person with some advocacy related to getting some resolution. She does not begin, in all situations, as the advocate. She provides generalized recommendations about the mental health system.

SEN. CROMLEY asked if that was the intent of SB 385 to make the ombudsman an impartial mediator and, if so, would it detract from the role of the court in the overall process. **SEN. ESP** said that SB 385 includes language from SB 46 that has already been adopted. The language change in SB 385 is "recommend corrective action only in regards to the public mental health system" not the child protective services system. The language was also drafted in consultation with the Mental Health Ombudsman's Office. It may be a subtle change, but a change none the less.

{Tape: 2; Side: B; Approx. Time Counter: 3.1 - 4.8}

SEN. CROMLEY asked for a response from **Ms. Adee**. **Ms. Adee** said that she did not have a strong opinion about the language change. In her conversations with **SEN. ESP**, she recalled saying that the proposed ombudsman in SB 385 be given a clear mandate as the Legislature did in the Mental Health Ombudsman mandate.

Closing by Sponsor:

{Tape: 2; Side: B; Approx. Time Counter: 4.8 - 7.3}

SEN. ESP said that he would be willing to work with whomever to create amendments for SB 385 that would be more amenable to address everyone's concerns. He said that it his contention that most of the families being impacted by the current process do not know about the grievance process in place and their ability to

access the system. To have an independent person do that is an important thing. He felt that a person who looks at a system from afar can have insights that people working within a system do not have. This could lead to improvements for families.

HEARING ON SB 402

Opening Statement by Sponsor:

{Tape: 2; Side: B; Approx. Time Counter: 7.3 - 20.9}

SEN. GARY PERRY (R), SD 35, read from a letter by **Ms. Alford** citing that in 44 states, mothers who carry a baby to near full-term or full-term, but through no fault of their own give birth to a stillborn child do not receive a certificate of birth of any kind. Montana is one of those states. There is no recognition of that child's birth because current procedures and laws do not allow for it. SB 402 creates a death certificate for stillborn infants. **SEN. PERRY** provided information from Rick Collins, Massachusetts State House News Service, regarding a bill passed that creates a special death certificate for stillborn infants and information on Arizona's HB 2416 requiring that the State Registrar of Vital Statistics establish a certificate of birth resulting in stillbirth.

[EXHIBIT\(jus36a06\)](#)

[EXHIBIT\(jus36a07\)](#)

Proponents' Testimony: None.

Opponents' Testimony: None.

Informational Testimony: None.

{Tape: 2; Side: B; Approx. Time Counter: 20.9 - 24.1}

Questions from Committee Members and Responses:

SEN. JON ELLINGSON, SD 49, asked if a definition of "stillbirth" was needed in statute. **SEN. PERRY** said that a definition of "stillbirth" should be included in SB 402.

SEN. CROMLEY said that because of the lack of either support of or opposition to SB 402, he was concerned that a couple may resent the fact that they may have to file information for a certificate after going through a stillbirth experience. **SEN. PERRY** said that because stillbirths are not recorded as a vital statistic in Montana, SB 402 requires that the stillbirths be

filed with the state, for statistical purposes, but it is an option for the parents to receive the certificate.

{Tape: 2; Side: B; Approx. Time Counter: 24.1 - 26.7}

Relaying a story about his Mother, **SEN. MCGEE** felt that SB 402 was an excellent bill. He said that recognizing the birth of a child as well as the death of a child gives closure to parents going through the experience.

SEN. JERRY O'NEIL, SD 3, asked if **SEN. PERRY** would be willing to amend the bill to include the language "after 20-weeks of gestation". **SEN. PERRY** said that the language is currently part of existing statute (50-15-403, MCA.) and will continue to be applicable under SB 420.

Closing by Sponsor:

{Tape: 2; Side: B; Approx. Time Counter: 26.7 - 26.8}

SEN. PERRY said that the people on both sides of this sensitive issue asked that he keep SB 402 clean, with no amendments, and address the creation of a death certificate for stillborn infants and that issue only. The best way to do that is through SB 402.

EXECUTIVE ACTION ON SB 319

{Tape: 3; Side: A; Approx. Time Counter: 0.4 - 7.8}

Motion: **SEN. ELLINGSON** moved that SB 319 DO PASS.

Motion: **SEN. ELLINGSON** moved the approval of amendment #SB031901.av1.

EXHIBIT(jus36a08)

Discussion: **SEN. ELLINGSON** said that the amendments are technical in nature and were brought to his attention by the Department of Revenue. SB031901.av1 provides that if a tax credit is claimed for making a contribution to the public money election campaign fund, a person cannot receive a deduction under 15-30-121, MCA.

Vote: **SEN. ELLINGSON'S** motion that amendment #SB031901.av1 be approved passed on a 12 to 0 voice vote. **SEN. MANGAN** voted aye by proxy.

Motion: **SEN. ELLINGSON** moved that SB 319 DO PASS AS AMENDED.

Discussion: **SEN. MCGEE** said that during the hearing on SB 319, he questioned the state debt and the two-thirds vote because the provision of SB 319 allows for a loan through the Board of Investments if the public money election campaign fund is low. He asked about the status of the question. **SEN. ELLINGSON** said that SB 319 provides for an intercap loan from the Board of Investments, which requires a two-thirds vote. He said that the bill would be referred to Senate Finance and Claims, and he needed to think the provision through a little more thoroughly. **SEN. MCGEE** said that he would not support SB 319 because it would constrain the amount of money that can be spent by the candidate who complies with the provision of the bill; it would not affect the candidate who does not comply; and it would not affect all of the advertisements that can be paid for through all of the lobbying efforts.

SEN. ELLINGSON said that if independent expenditures are made on behalf of a nonpublically financed candidate, the publically financed candidate has the right to ask for up to 200% of the amount from the public fund in order to match it. He hoped that it would serve as a deterrent function. Although SB 319 is not perfect, it takes a step in the right direction to tell independent entities that they will no longer have a free ride and that they cannot pile on the funds because the publically financed candidate is going to be matched up to the 200% level regardless of whether more money is put in or not.

{Tape: 3; Side: A; Approx. Time Counter: 7.8 - 8.9}

SEN. CURTISS opposed SB 319 because it placed too much discretion in the hands of the Commissioner of Political Practices and because it included no constraints.

SEN. O'NEIL thought that SB 319 was horrible in the fact that when he voices his support for one candidate, the state will voice its support for the opposing candidate. SB 319 nullifies his voice in a race for a Supreme Court candidate.

{Tape: 3; Side: A; Approx. Time Counter: 8.9 - 12.1}

SEN. LYNDA MOSS, SD 26, felt that SB 319 merited the Committee's support and is critical to begin looking at campaign reform.

SEN. WHEAT said that his concern about judges' elections is that they are nonpartisan races that are becoming more partisan and because more money is being dumped into the races. The Montana Judiciary is suppose to be an independent judiciary. He felt it incumbent upon the Legislature to keep those elections as independent as possible. He added that most judges, whatever

their political persuasion was before they were elected to the bench, in most cases, try very hard to maintain their judicial integrity and try to remain as nonpartisan as possible.

{Tape: 3; Side: A; Approx. Time Counter: 12.1 - 14.2}

Vote: SEN. ELLINGSON'S motion that SB 319 DO PASS AS AMENDED passed on an 8 to 3 roll call vote. SENATORS O'NEIL, MCGEE, and CURTISS voted nay and SEN. LASLOVICH was excused.

EXECUTIVE ACTION ON SB 344

{Tape: 3; Side: A; Approx. Time Counter: 14.2 - 18.7}

Motion: SEN. CROMLEY moved that SB 344 DO PASS.

Discussion: SEN. WHEAT said that SB 344 amends the punitive damage statute to: (1) remove the cap for those cases where the defendant was under the influence of alcohol or drugs at the time of the wrongdoing, and (2) provide that 50% of any punitive award went to the state to be deposited into the Crime Victims' Compensation Fund.

Motion: SEN. ELLINGSON moved the approval of amendment #SB034401.av1.

EXHIBIT(jus36a09)

Discussion: SEN. ELLINGSON said that there was some question of whether SB 344 applied only to the person who was actually under the influence of alcohol. To remove any possibility of misunderstanding, SB034401.av1 states that the removal of the punitive damages caps cannot be used to raise the responsibility for damages on the part of someone who is the principal of the driver or the employer of the driver.

{Tape: 3; Side: A; Approx. Time Counter: 18.7 - 18.8}

Vote: SEN. ELLINGSON'S motion that amendment #SB034401.av1 be approved passed on an 11 to 0 voice vote. SEN. MANGAN voted aye by proxy and SEN. LASLOVICH was excused.

Motion: SEN. CROMLEY moved that SB 344 DO PASS AS AMENDED.

Discussion: SEN. MCGEE asked if the amendment satisfied the concerns of the opponents to SB 344. SEN. WHEAT said, yes, adding that the opposition came from the Trucking Association. The

amendment makes it clear that if a truck driver causes an accident while under the influence of alcohol or drugs at the time, the driver is the responsible party for the punitive damages. This is addressed by stating that the legal theories of vicarious liability and doctrines of respondent superior do not apply. However, if there is a case where the trucking company has direct knowledge that one of its employees has a drug or alcohol problem and if the trucking company continues to allow the person to drive, there may be an independent claim against the trucking company based on the company's own failures. **SEN. MCGEE** said that the way he reads SB 344, the driver could be held liable and there would be no punitive cap on him, but the owner could also be named in the lawsuit whether or not they knew about the driver's problem. **SEN. WHEAT** agreed, but stated that the cap would still apply to the trucking company. **SEN. MCGEE** preferred that SB 344 say that whoever is driving under the influence be liable. He did not believe there to be a vicarious liability against the trucking company owner unless it can be shown. **SEN. WHEAT** said that whether SB 344 passed or not, there is still the potential for that to happen.

Vote: **SEN. CROMLEY'S** motion that SB 344 DO PASS AS AMENDED passed on a 9 to 2 voice vote with **SENATORS CURTISS** and **MC GEE** voting nay. **SEN. MANGAN** voted aye by proxy and **SEN. LASLOVICH** was excused.

EXECUTIVE ACTION ON SB 374

{Tape: 3; Side: B; Approx. Time Counter: 7.9 - 12.5}

Motion: **SEN. CROMLEY** moved that SB 374 DO PASS.

Discussion: **SEN. WHEAT** said that SB 374 changes the manner in which the Chief Justice of the Supreme Court is selected.

SEN. MCGEE asked that the constitutional question related to SB 374 be addressed. **Valencia Lane, Staff Attorney, Legislative Services Division (LSD)**, said that when she began drafting SB 374, she had concerns that it may need to be redrafted as a constitutional amendment. Following further research, she found that although the office of Chief Justice of the Supreme Court is a constitutionally recognized office, the section that addresses the selection of the Chief Justice is not separate from the selection of any other justice. It speaks only of selection of justices and provides that it shall be "as provided by law". Wherever that appears in the Constitution that means "as provided for by the Legislature". In addition, she read the entire transcript of the Constitutional Convention notes where it

discussed the selection of the Supreme Court. Much discussion surrounded whether or not Supreme Court Justices and all judges should be selected by appointment or by vote of the people. However, nowhere in the notes did it discuss that the Chief Justice should be selected separate and apart from any of the others. Although some concern remains, she is confident that it can be done as provided for in SB 374.

{Tape: 3; Side: B; Approx. Time Counter: 12.5 - 20.8}

SEN. CROMLEY asked whether a condition could be included in SB 374 to state that if a Supreme Court Justice, during the middle of his or her term, loses his or her office. **Ms. Lane** said that case law states that the Legislature cannot change an office while the person is still in office. That particular concern was addressed by the effective and applicability dates which state that: "This act is not effective until January 5, 2009.", which would be after the term of office of the current Chief Justice.

SEN. SHOCKLEY asked if the Chief Justice made more money than the rest of the Justices. **Ms. Lane** said, yes, and it was accounted for in SB 374 by not addressing current law. Current law requires that an average salary be taken of all Chief Justices and Justices of the surrounding states and that is the salary for the Montana Supreme Court. This language was included in the original draft of SB 374 so that all Justices would be paid the same. **SEN. WHEAT** did not want to address that section of law because the Chief Justice has duties above and apart from other Justices. Under SB 374, the Chief Justice and the person serving in the office of Chief Justice will be paid more according to the way the statute currently exists, and the duties and emoluments will be rotated on a 2-year basis.

SEN. SHOCKLEY said that under the federal system, a judge's salary cannot be decreased during that person's term of office. **SEN. WHEAT** said that SB 347 is designed to become effective only after Chief Justice Gray's present elected term expires. After that time, the Chief Justice position rotates among the Supreme Court members and the pay rotates with them. **SEN. SHOCKLEY** said that whoever the Chief Justice is will receive X-amount of money for two year. After that, the person receives an X-amount minus a Y-amount. He felt that it may cause a problem. **Ms. Lane** said that scenario could be an argument. However, from the day SB 374 takes effect, as the office rotates during the 2-year period, the person will accept that office with the understanding that they will receive additional duties with additional pay. When the two years end, their pay will return to what it was. Although a person who is elected to the office cannot have their salaries changed, that does not mean that the Legislature cannot create an

office with a salary that will fluctuate. She did not believe that if a person runs for the office and accepts it that way that it could be legally challenged. She added that if it is challenged and taken to the Supreme Court, guess who is going to be ruling on the constitutionality of it?

SEN. O'NEIL said his concern is that Article VII(2) of the Constitution states that the Supreme Court shall make rules of procedure for the Court not the Legislature. **Ms. Lane** said that the fundamental issues are the question of separation of powers between the two bodies of government and whether or not SB 374 would be found constitutional. Looking at statutes from other states and the discussions of the Constitutional Convention notes, there would be good arguments that SB 374 could be found constitutional, but she could not guarantee it.

Vote: **SEN. CROMLEY'S** motion that SB 374 DO PASS carried on an 8 to 4 voice vote. **SENATORS O'NEIL, MCGEE, PERRY, and CURTISS** voted nay. **SEN. MANGAN** voted aye by proxy.

EXECUTIVE ACTION ON SB 375

{Tape: 3; Side: B; Approx. Time Counter: 21.2 - 25.8}

Motion: **SEN. SHOCKLEY** moved that SB 375 (change venue in FELA cases) DO PASS.

Discussion: **SEN. SHOCKLEY** said that during the hearing on SB 375, the MT Trial Lawyers Association's (MTLA) position was that the railroad companies have too much influence on the jury pool. Then the graingrowers, who hate the railroads, testified for the railroads. In addition to that, people from Butte testified that they will cut back service if the Legislature does not pass SB 375. He then thought of the most egregious criminal statute--the special provision related to railroads (\$500 worth of damage is worth five years at MSP with no probation or parole). He felt that SB 375 had merit, and he was going to support it.

SEN. MCGEE opposed SB 375 because the bill was about political power. In 1995 and 1997, when the Republicans were in control, the language to allow for venue changes was changed to restricted. Now that the political power has changed, it gives the opportunity to change the language to another way. He did not believe that venue shopping was legitimate and did believe that current law is fair for both the plaintiff and defendant.

SEN. PERRY also opposed SB 375 because the state has adequate laws to provide for proper venue for those who feel that they

cannot get an impartial trial. The laws apply to every worker in Montana, therefore, SB 375 is a bad bill.

Vote: SEN. SHOCKLEY'S motion that SB 375 DO PASS carried on an 8 to 4 roll call vote. SENATORS O'NEIL, MCGEE, PERRY, and CURTISS voted nay.

ADJOURNMENT

Adjournment: 11:55 A.M.

SEN. MIKE WHEAT, Chairman

MARI PREWETT, Secretary

LOIS O'CONNOR, Transcriber

MW/mp

Additional Exhibits:

EXHIBIT ([jus36aad0.PDF](#))